BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

CENTRAL PUGET SOUND REGION

STATE OF WASHINGTON

LOWELL ANDERSON, JEFFREY RODGERS, DOUGLAS HAMAR, CHAD MCCAMMON AND BOB MARTIN, Petitioners, v. CITY OF MONROE, Respondent.	**CASE No. 12-3-0007** *(Anderson)* **ORDER ON DISPOSITIVE MOTION**

This matter came before the Board on the City of Monroe's motion to dismiss the Petition for Review (PFR) for mootness.[1] The Board finds the challenged ordinance has been repealed by the City and the appeal is accordingly moot. The petition is dismissed.

PROCEDURAL BACKGROUND AND STATEMENT OF FACTS

On July 10, 2012, the City of Monroe adopted Ordinance No. 018-2012 which amended its comprehensive plan to reclassify approximately 50 acres in the East Monroe area from Limited Open Space to General Commercial. At the time, an appeal of the Final Phased Environmental Impact Statement (FSEIS) for the reclassification was pending before the City's Hearing Examiner. The Examiner held a hearing July 19, 2012, and issued a decision determining: "The FSEIS . . . defers all environmental analysis to the future rather than addressing the 'big picture' before the decision to change the land use designation and zoning is made. Thus, the FSEIS is inadequate as a matter of law."[2] The Hearing Examiner's decision was not appealed.

[1] Respondent City of Monroe's Motion to Dismiss (Nov. 6, 2012).
[2] Hearing Examiner's Decision – Revised After Reconsideration, August 8, 2012, p.19

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On September 4, 2012, the City Council adopted Ordinance No. 019/2012 which repealed Ordinance No. 018/2012. At the same meeting, the City Council re-docketed the East Monroe area for comprehensive plan review in 2013 and terminated its contract with the Hearing Examiner.[3]

On September 17, 2012, Petitioners, who live in homes on the bluff above the East Monroe area,[4] filed an appeal of Ordinance No. 018/2012 with the Growth Management Hearings Board. The PFR asserted the repeal of the ordinance did not render the case moot.[5]

Following a prehearing conference and the issuance of a Prehearing Order setting the schedule for filing motions and briefs, the City of Monroe timely filed its dispositive motion asserting the challenge to the repealed ordinance should be dismissed as moot.[6] Petitioners' responsive brief was filed November 29, 2012, and the City replied on December 3, having not yet received the Petitioner's Response.[7] On December 5, 2012, the City filed a Motion to Strike Petitioners' Response for failure to file and serve in accordance with the case schedule.

BOARD DISCUSSION AND ANALYSIS

Motion to Supplement the Record

Because of the Board's decision on the City's dispositive motion, the motion to supplement the record is not addressed.

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[3] PFR at 5-6.
[4] PFR at 9. According to the Hearings Examiner's Findings of Fact, the East Monroe area contains an oxbow slough of the Skykomish River. The area is subject to floods and inundation which creates a risk of undercutting the toe of the bluff. The bluff is high (100-200 feet) and steep (>40%) with a history of landslides.
[5] PFR at 10-11.
[6] Petitioners also filed a motion to supplement the record (Nov. 7, 2012), to which the City responded with objections (Nov. 27, 2012).
[7] Response to City of Monroe's Motion to Dismiss (Nov. 29, 2012);
Respondent City of Monroe's Reply (Dec. 3, 2012)

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Motion to Strike

The Board strikes Petitioner's Response to City of Monroe's Motion to Dismiss as untimely filed. The Prehearing Order set a November 27 deadline for response to dispositive motions. Petitioners' Response was signed November 28 – a day late – and received by the Board, according to its electronic records, at 5:10 p.m. on that date. WAC 242-03-240(1) provides that documents received electronically in the Board's office after 5:00 p.m. will be stamped received on the following day.[8] Accordingly, Petitioners' Response, due November 27, was filed November 29.

WAC 242-03-240(2) requires electronic service on other parties: "Service is accomplished when the document is transmitted electronically … by the required date." The City's Motion to Strike states the Response was not served on the City electronically but by U.S. mail and was not received by the City's attorney until December 4, a day after the deadline for the City's reply. The City's Reply (timely filed on December 3) asks the Board to grant the motion to dismiss because "Petitioners Lowell Anderson, et al. did not file a response to the City's motion and have thus effectively conceded the City's request." The City subsequently received Petitioners' Response and filed the motion to strike.

The Board **grants** the motion to strike Petitioners' Response.[9] The Board considers the City's dispositive motion without reference to Petitioners' November 29, 2012 Response. In deciding the City's dispositive motion, the Board relies on the facts and authorities in the PFR, the City's Motion and Reply, and the Board's own research.

[8] WAC 242-03-240(1) "…Any transmission not completed before 5:00 p.m. will be stamped received on the following business day. The date and time indicated by the board's . . . receiving computer will be presumptive evidence of the date and time of receipt of transmission . . . ."

[9] The Board empathizes with the pressures on sole practitioners working often without staff or the backup of fellow attorneys. We expect attorneys to extend professional courtesy and allow flexibility when the other party calls and requests accommodation in tight circumstances. Here there was apparently no request.

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Motion to Dismiss

The City advances two arguments in support of dismissal for mootness. First, the City asserts that any governmental action taken in violation of SEPA is void and "a legal nullity from inception."[10] Under the Monroe Municipal Code MMC 20.04.2000(B)(3), an unappealed hearing examiner's decision on EIS adequacy is a final decision. Ordinance 018/2012, having been adopted under a legally deficient EIS, is accordingly void, the City states, and any challenge to it is therefore moot.

Second, the City asserts the challenge is moot because "Ordinance 018/2012 has been repealed and there is nothing left for the parties to litigate."[11]

Petitioners in their PFR assert this matter falls under the exception for mootness for "matters of continuing and substantial interest," allowed in *Orwick v. Seattle.*[12] Petitioners state the case involves substantial public participation challenges, and that the "issues are likely to recur in the future," given the City's pattern of behavior and apparent commitment to the project.[13]

The Board starts from the premise that it is a tribunal of limited jurisdiction, authorized by statute to hear challenges to the adoption and amendment of comprehensive plans and development regulations. RCW 36.70A.280(1)(a). The relief the Board is authorized to provide is a finding of non-compliance and a determination of invalidity. RCW 36.70A.300; .302. Washington courts have held that "[a] case is moot if a court can no longer provide

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[10] Motion at 5, citing *Barrie v. Kitsap County*, 93. Wn.2d 843, 861, 613 P.2d 1148 (1980); *Juanita Bay Valley Community Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140(1973); *Lassila v. Wenatchee*, 89 Wn.2d 804, 817, 576 P.2d 54 (1978); *Eastlake Community Council v. Roanoke Assocs., Inc*., 82 Wn.2d 475, 497-98, 513 P.2d 36 (1973).

[11] Motion at 7-8, citing *Kent Cares, et al. v. City of Kent*, CPSGMHB No. 02-3-0019, Order on Motions (March 14, 2003), at 8; *McVittie, et al. v. Snohomish County*, CPSGMHB No.99-3-0016c, Final Decision and Order (Feb. 9, 2000), at 14; *Gawenka, et al. v. Bremerton*, CPSGMHB No. 00-3-0011, Order on Dispositive Motion (Oct. 10, 2000), at 3.

[12] 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

[13] PFR at 10-11, citing *McVittie.*

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effective relief."[14] Mootness is directed at jurisdiction, and as such may be raised at any time.[15] In *Harbor Lands, LP*,[16] the Court of Appeals determined the case was moot because the City of Blaine had rescinded the challenged land use decision prior to entry of the Superior Court's judgment.

Applying the Court's reasoning, repeal of an ordinance renders an appeal to the Board moot "because there is no currently effective legislative action to challenge."[17] As the Western Board explained in *ARD v. Mason County*,[18] when the county rescinds the challenged ordinances, "jurisdiction to continue the case is lost. Where there are no DRs for which a finding of compliance or noncompliance could be made, a board must dismiss the case." In *Hazen v. Yakima County*, [19] the Eastern Board pointed out when a challenged provision has been amended or repealed, "the amendment/repeal provides the relief requested by petitioner," and the matter is moot. The Central Board in *Giba, et al v. City of Burien*[20] stated: "With the repeal of Section 2, the Board **no longer has subject matter jurisdiction**. The Board also notes that by the repeal of Section 2 the **City itself has provided the relief** requested by Petitioners."(emphasis added)

The Board notes that the City of Monroe has put the East Monroe area on its 2013 comprehensive plan amendment docket and begun the phased EIS process. The PFR alleges a pattern of SEPA and public process violations by the City in support of the East

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[14] *Orwick*, 103 Wn. 2d at 249.
[15] *Citizens for Financially Responsible Gov't v. City of Spokane,* 99 Wn.2d 339, 350 (1983).
[16] *Harbor Lands, LP v. City of Blaine*, 146 Wn. App. 589, 595 (2008).
[17] *Gawenka,* at 3. Other cases where Petitioners' challenges were dismissed as moot when challenged provisions had been repealed or replaced include *Ellis Island v. San Juan County*, WWGMHB No. 97-2-0006, Final Decision and Order (June 19, 1997); *Martin v. Whatcom County*, WWGMHB No. 11-2-0002, Final Decision and Order (July 22, 2011), at 18-19; *Covington Golf v. City of Covington*, CPSGMHB No. 05-3-0049, Order of Dismissal (Feb. 7, 2008), at 2 (Board dismissed *sua sponte* on evidence of repeal of challenged provision).
[18] WWGMHB No. 01-2-0017, Order on Motions (Oct. 12, 2001).
[19] EWGMHB No. 08-1-0008c, Final Decision and Order (Apr. 5, 2010), at 13-14.
[20] CPSGMHB No. 06-3-0008, Order of Dismissal (Apr. 17, 2006), at 3 (emphasis added).

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Monroe development. Petitioners fear procedural game-playing by the City and urge that "they should not be left to take their chances" on a future appeal of the City's eventual action.[21] The PFR suggests the City's "continuing action" brings this case within the narrow exception to the mootness doctrine for "matters of continuing and substantial interest."[22]

The Board disagrees. The Board assumes good faith on the part of public officials[23] and will not prejudge the City's process. The City planning process and SEPA procedures will provide opportunities for Petitioners to get their facts into the new record and eventually appeal the City's action, if it again appears to them to violate SEPA or the GMA. A Board ruling at this juncture on the repealed ordinance, for the purpose of guiding the City's consideration of future proposals, would constitute an advisory opinion, which is prohibited by RCW 36.70A.290(1).

In conclusion, the Board finds Ordinance 018/2012 has been repealed by the City of Monroe. The challenged City action is no longer operative and the Board can no longer provide relief. The Board concludes the Petition for Review is moot and must be dismissed.

ORDER

Based on Ordinance 019/2012, the Petition for Review, the City's Motion to Dismiss, the law and cases cited above, and having deliberated on the matter, the Board ORDERS:

- The City's adoption of Ordinance No. 019/2012 renders the Petition for Review of Ordinance No. 018/2012 **moot.**

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[21] PFR at 10.

[22] Citing *Orwick* and *McVittie.* The Board notes another exception is when a 6-month moratorium adopted under RCW 36.70A.390 expires and is replaced by a subsequent moratorium. *DOC v. Lakewood*, CPSGMHB No. 05-3-0043c, Final Decision and Order (Jan. 31, 2006); *Camwest v. City of Sammamish*, CPSGMHB No. 05-3-0027, Final Decision and Order (Aug. 4, 2005).

[23] *Petso II v. City of Edmonds,* CPSGMHB No. 09-3-0005, Final Decision and Order (Aug. 17, 2009), at 32; *Central Puget Sound Regional Transit Agency v. City of Tukwila*, CPSGMHB No. 99-3-0003, Final Decision and Order (Sep. 15, 1999), at 7; *Pilchuck v. Snohomish County*, CPSGMHB No. 95-3-0047, Final Decision and Order (Dec. 6, 1995), at 38.

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- The matter of *Lowell Anderson, et al. v. City of Monroe* is **dismissed.**
- Case No. 12-3-0007 is **closed**.

DATED this 11th day of December, 2012.

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Margaret A. Pageler, Board Member

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Raymond L. Paolella, Board Member

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Cheryl Pflug, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[24]

[24] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-3-830(1), -840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970.
It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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